October 30, 1998

D.T.E. 98-104

Investigation by the Department into an arbitrated interconnection agreement between New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts, and MCImetro Access Transmission Services, Inc. pursuant to § 252(e) the Telecommunications Act of 1996.

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FOR: NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY d/b/a BELL ATLANTIC-MASSACHUSETTS
Petitioner

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-and-

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Petitioner

I. INTRODUCTION

On October 2, 1998, pursuant to § 252(e) of the Telecommunications Act of 1996 ("Act"), New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts ("Bell Atlantic") and MCImetro Access Transmission Services, Inc. ("MCI") filed their final arbitrated interconnection agreement ("Agreement") for approval by the Department of Telecommunications and Energy ("Department"). The Department docketed review of the Agreement as D.T.E. 98-104. Under § 252(e)(4) of the Act, the Department must approve or reject the Agreement within 30 days of the filing (i.e., by November 1, 1998), or it shall be deemed approved.

The Agreement includes both negotiated and arbitrated portions that set forth rates, terms and conditions under which Bell Atlantic and MCI will interconnect their respective networks, as well as the network elements, services, and other arrangements that Bell Atlantic will provide to MCI. On August 29, 1996, MCI, pursuant to Section 252 of the Act, filed a petition for arbitration with the Department, which was docketed as D.P.U. 96-83. The docket was subsequently consolidated with four other petitions for arbitration, thus establishing the Consolidated Arbitrations docket. D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 ("Consolidated Arbitrations"). The arbitrated rates, terms and conditions in the Agreement were determined by the Department in a series of Orders in the Consolidated Arbitrations. Consistent with the deadlines under the Act, the Department completed the arbitration of all issues then identified by the parties in the Consolidated Arbitrations by December, 1996. See Consolidated Arbitrations, Phase 1 Order (November 11, 1996), Phase 2 Order (December 3,

1996), Phase 3 Order (December 4, 1996), and Phase 4 Order (December 4, 1996). Following the issuance of certain subsequent Orders concerning Bell Atlantic compliance filings and motions for reconsideration or clarification, the Department ordered the parties to the Consolidated Arbitrations to work out contract language for the arbitrated provisions, and to submit to the Department final interconnection agreements containing both negotiated and arbitrated provisions. See Consolidated Arbitrations, Phase 2-A (February 5, 1997); Phase 3-A (February 5, 1997); Phase 4-A (February 5, 1997); Phase 4B/2B (June 2, 1997).

Late in 1996, Bell Atlantic and MCI also participated in a bilateral arbitration proceeding, conducted by arbitrator Paul Hartman, which was designed to resolve issues relating to their interconnection agreement. On December 26, 1996, the Department issued an Order adopting the findings of Mr. Hartman. MCI/NYNEX Arbitration, D.P.U. 96-83 (1996). In that Order, the Department asked Bell Atlantic and MCI to prepare a final agreement based on the arbitration awards. During the course of that effort, the companies requested another arbitration procedure to resolve disputed contract language. The Arbitrator held hearings and subsequently issued five arbitration awards between July 1997 and February 1998. The parties were given the opportunity to file exceptions to these awards. In our Order, MCI/Bell Atlantic Arbitration, D.P.U./D.T.E. 96-83 (1998) ("Order on Exceptions") issued May 21, 1998, the Department responded to the parties' exceptions to rulings issued by the Arbitrator, and adopted the balance of the Arbitrator's awards. The Department also directed the parties to incorporate those determinations into an interconnection agreement and to file that agreement with the Department. Several weeks after the Order on Exceptions was issued, the parties informed the Department of their inability to reach agreement on the language of three sections of the

interconnection agreement. On June 18, 1998, Bell Atlantic and MCI each filed an interconnection agreement containing different versions of the disputed terms. On July 1, 1998, Bell Atlantic and MCI each filed comments indicating its understanding of the nature of the disagreements and its proposed contractual language. On September 17, 1998, the Department issued our Order on MCI/Bell Atlantic Arbitration, D.P.U./D.T.E. 96-83 (1998) ("Order on Bell Atlantic/MCI Interconnection Agreements") which resolved these remaining issues[1] and required the parties to file their completed interconnection agreement with the Department.

In the meantime, MCI and Bell Atlantic, along with the other parties to the Consolidated Arbitrations, participated in arbitration proceedings concerning performance standards and payments, and the arbitration of newly-identified issues, including dark fiber rates, collocation rates, operation support systems and non-recurring costs, and unbundled network elements ("UNE") combinations. Certain of those issues continue to be arbitrated.[2] On October 2, 1998, MCI and Bell Atlantic filed a final interconnection agreement which includes **?**placeholders" to incorporate the Department's arbitrated decisions on those issues,

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[1] The issues determined by the Department in the Order on Bell Atlantic/MCI Interconnection Agreements were: (1) inclusion of "placeholder" language for the unbundled network element combinations issue; (2) which items are appropriately included in the pricing schedule; and (3) inclusion of language relating to directory listings.

[2] On June 11, 1998, the Department issued its Order on collocation pricing. Consolidated Arbitrations, Phase 4-G Order (1998). On September 25, 1998, the Department issued its most recent Order on performance standards and payments. Consolidated Arbitrations, Phase 3-E Order (1998).

when determined.[3]

Pursuant to notice duly issued, the Department held a public hearing in this proceeding on October 22, 1998. No comments were received at the public hearing. In addition, the Department received no written comments in response to our request for comments on the Agreement.

II. DESCRIPTION OF AGREEMENT

The Agreement is a comprehensive set of rates, terms and conditions governing the interconnection of Bell Atlantic's local exchange network with MCI's network, including: (1) local interconnection; (2) local resale; (3) unbundled network elements; (4) access to poles, ducts, conduits, and right-of-way; (5) interim number portability; (6) dialing parity; and (7) collocation (BA/MCI Agreement at A-3, A-5). The Agreement runs for three years from the date of this Order and is renewable (BA/MCI Agreement at A-3).

The Agreement's provisions based on matters resolved in the Consolidated Arbitrations (BA/MCI Agreement at A-1), a series of Arbitrator's Awards which were adopted by the Department (see D.T.E. 96-83 (December 26, 1996); Order on Exceptions (May 21, 1998)), and the Order on Bell Atlantic/MCI Interconnection Agreements. One such provision, contained in the Agreement, requires that the Agreement include language that Bell Atlantic is not obligated to combine UNEs until the issue is definitively decided by either the Department or the United States Supreme Court (BA/MCI Agreement at A-1; Order on Bell Atlantic/MCI

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[3] In their transmittal letter, Bell Atlantic and MCI indicated that the parties are identifying changes to the Pricing Attachment, and that once these changes have been identified, the parties will file a revised attachment.

Interconnection Agreements, at 4).[4] The Agreement also contains Attachment I, the pricing attachment proposed by Bell Atlantic in its earlier submission of its Agreement, which the Department ordered to be included in the current submission of the Agreement. Order on Bell Atlantic/MCI Interconnection Agreements, at 6. Further, the Agreement provides for MCI's control of certain directory assistance information, and the licensing and use of MCI subscriber listings, as the Department ordered in Order on Bell Atlantic/MCI Interconnection Agreements, at 7 (BA/MCI Agreement, Att. VIII at 54-55). In addition, the Agreement contains "placeholders" for certain newly-identified issues that the Department is currently arbitrating in the Consolidated Arbitrations (see e.g., BA/MCI Agreement, Att. X at 1).

III. STANDARD OF REVIEW

A. Negotiated Agreements

Section 252(e)(1) of the Act requires parties to an interconnection agreement to submit the agreement to a state commission for approval, and further requires state commissions to approve or reject the agreement with written findings as to any deficiencies. The state commission may only reject negotiated portions of an agreement if it finds that (1) the agreement discriminates against a telecommunications carrier not a party to the agreement, or (2) the implementation of such agreement is not consistent with the public interest,

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[4] With regard to this provision, the parties have also agreed, upon written request by either party, to negotiate in good faith in an expeditious manner to appropriately modify the Agreement to comply with the decision of the Department or the United States Supreme Court (BA/MCI Agreement at A-1).

convenience, and necessity.[5] 47 U.S.C. § 252(e)(2)(A).

B. Arbitrated Agreements

The state commission may only reject arbitrated portions of an agreement if it finds that the agreement does not meet the requirements of Section 251 of the Act, including the regulations prescribed by the Federal Communications Commission ("FCC") pursuant to Section 251,[6] or the pricing standards set forth in Section 252(d) of the Act. 47 U.S.C. § 252(e)(2)(B). The state commission may also establish other non-price requirements in its review of an agreement, including service quality standards. 47 U.S.C. § 252(e)(3).

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5 In NYNEX/MFS Interconnection Agreement, D.P.U. 96-72, at 15-16 (1996), the Department rejected arguments that negotiated terms should be subject to the requirements of 47 U.S.C. § 251 relating to arbitrated terms.

6 The FCC issued regulations pursuant to Section 251 of the Act in its First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325, adopted August 1, 1996 (released August 8, 1996) ("First Report and Order"). On July 18, 1997, the United States Court of Appeals for the Eighth Circuit, inter alia, vacated the FCC's pricing rules for interconnection, unbundled elements, reciprocal compensation, and resale because it determined that the FCC exceeded its jurisdiction in promulgating those rules. Iowa Utilities Board, et al. Petitioners v. Federal Communications Commission; United States of America, Respondents, 120 F.3d 753 (8th Cir., July 18, 1997, as amended on rehearing on October 14, 1997) (1997) ("Eighth Circuit Decision"). In addition, the Eighth Circuit vacated the "pick and choose" rule on the ground that it is "an unreasonable construction of the Act." Id. at 801.

IV. ANALYSIS AND FINDINGS

A. Negotiated Provisions

Consistent with the Department's review of prior negotiated interconnection agreements (see e.g., MFS/NYNEX Interconnection Agreement, D.P.U. 96-72 (1996)) and in accordance with the above standard of review, we find that the negotiated provisions of the Agreement that do not discriminate against a telecommunications carrier not a party to the Agreement and implementation of the Agreement is consistent with the public interest, convenience, and necessity.

The negotiated portions in the Agreement do not bind other carriers; other carriers are free to negotiate their own arrangements with Bell Atlantic. In addition, the negotiated portions in the Agreement meet the requirements of 47 U.S.C. § 252(i) by making any interconnection, service, or network element, provided under the Agreement to MCI, available to other telecommunications carriers on the same terms and conditions, if so requested (see BA/MCI Agreement at A-17).

Moreover, the implementation of the negotiated portions in the Agreement is consistent with the public interest, convenience, and necessity where the provisions, which account for a substantial portion of the Agreement, were the product of good faith negotiations between Bell Atlantic and MCI.

Accordingly, the Department hereby approves the negotiated provisions of the Agreement. In approving these provisions, however, the Department makes no findings on the applicability of these terms and conditions to other interconnection agreements that may be

submitted for Department review in the future.

B. Arbitrated Provisions

Before addressing the substantive issues, it is important that we discuss the impact of the Eighth Circuit Decision on our analysis, which, as of the date of this Order, is on appeal to United States Supreme Court.[7] As we stated in Brooks Fiber/NYNEX Interconnection Agreement, D.P.U. 97-70 (1997), "the Eighth Circuit struck down the FCC's pricing rules, including its TELRIC methodology for unbundled elements and avoided cost methodology for the resale discount, on jurisdictional grounds only and made no findings with respect to whether those methods complied with the pricing standards of Section 252(d)." D.P.U. 97-70, at 7. Because only the jurisdiction of the FCC to establish pricing requirements was challenged, and not the underlying pricing methods, the Department found that it could continue to rely on those methods, which were used in the Consolidated Arbitrations in reviewing final arbitrated interconnection agreements. Our use of these pricing methods will continue unless we determine that the interim rates established through those methods are no longer appropriate for setting rates for UNEs, reciprocal compensation, and resale. See Consolidated Arbitrations, Phase 2, at 4-8.

In Bell Atlantic Resale Tariff, D.T.E. 98-15 (1998), the Department currently is developing permanent resale discounts (Phase II) and permanent rates for unbundled elements (Phase III). However, unless and until the Department changes the interim resale discounts and UNE rates, those rates remain in effect. Accordingly, the Department finds that our use

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[7] AT&T Corp., et al. v. Iowa Utilities Board, et al., 118 S. Ct. 879 (1998).

of the interim resale discounts and UNE rates in the Consolidated Arbitrations, included in the Agreement under review in this proceeding, are still valid, and are not affected by the Eighth Circuit Decision. Further, as with all other Bell Atlantic negotiated and arbitrated agreements in which interim rates are used, the interim rates contained in this Agreement are subject to change based on the results of D.T.E. 98-15 and other subsequent Department investigations, and MCI and Bell Atlantic shall be required to incorporate such results as amendments to their agreements. See D.T.E. 98-15 (Phase I) at 13-15 (Department held that arbitrated terms in Bell Atlantic's resale tariff shall supersede corresponding provisions in existing resale agreements, and further held that arbitrated permanent resale discounts shall supersede interim discounts contained in existing agreements). In addition, with regard to "placeholder" provisions in the Agreement for issues yet to be decided in the Consolidated Arbitrations, the Department directs MCI and Bell Atlantic to submit for Department approval relevant contract language after we issue decisions on those provisions.

With respect to the arbitrated terms of the Bell Atlantic/MCI Agreement, the Department has reviewed the contract language of the arbitrated provisions and compared that language to the applicable Department-arbitrated decisions. We find those provisions consistent with our review of prior arbitrated agreements, e.g., AT&T/Bell Atlantic Interconnection Agreement, D.T.E. 98-35 (1998); ACC National Telecom Corp. Interconnection Agreement, D.P.U. 97-85 (1997). We also find that the parties have correctly incorporated the relevant portions of those arbitrated decisions into the Agreement. In addition, the Department determines that the arbitrated portions of the Agreement meet the requirements of Section 251 of the Act, including the regulations prescribed by the FCC in the

First Report and Order. The Department also finds that the arbitrated pricing arrangements in the Agreement meet the pricing standards set forth in Section 252(d) of the Act.[8] However, as noted above, in light of the Eighth Circuit Decision vacating the FCC's pricing rules, there is no need for the Department to consider whether the arbitrated rates conform to the requirements of those rules. Thus, for the reasons stated, the Department also approves the arbitrated portions of the Agreement.

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[8] Section 252(d) states, inter alia, that charges for interconnection and network elements shall be "based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and ... nondiscriminatory, and ... may include a reasonable profit"; that charges for transport and termination of traffic shall "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier" ... and shall be based on "a reasonable approximation of the additional costs of terminating such calls"; and that the wholesale rates shall be determined "on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier."

V. ORDER

Accordingly, after due notice, hearing, and consideration, it is

ORDERED: That the final arbitrated interconnection agreement between New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts and MCImetro Access Transmission Services, Inc., filed with the Department on October 2, 1998, be and hereby is approved; and it is

FURTHER ORDERED: That Bell Atlantic and MCI comply with all directives contained herein.

By Order of the Department,

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Janet Gail Besser, Chair

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James Connelly, Commissioner

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W. Robert Keating, Commissioner

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Paul B. Vasington, Commissioner

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Eugene J. Sullivan, Jr., Commissioner